

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CF2110
	EEOC NO.: 21BA90884
RUFINA GUERRERO,)	ALS NO.: 09-0735
)
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee V. Freeman and Charles E. Box, presiding, upon Rufina Guerrero's (the "Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CF2110; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, WHEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following grounds:

- A) Count A for **LACK OF SUBSTANTIAL EVIDENCE**; and**
- B) Count B for **LACK OF JURISDICTION**.**

In support of which determination the Commission states the following findings of fact and reasons:

1. On January 8, 2009, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged her former employer Mead Westvaco Consumer Packaging Group, LLC ("Employer") discharged her in retaliation for having opposed unlawful sexual harassment (Count A) and because of her physical disability, hip joint disorder (Count B), in violation of Sections 6-101(A) and 2-102(A) of the Illinois Human Rights Act (the "Act"). On November 20, 2009, the Respondent dismissed the Petitioner's charge for Lack of Substantial Evidence (Count A) and Lack of Jurisdiction (Count B). On December 23, 2009, the Petitioner timely filed this Request.
2. The Petitioner was employed as a Gluer Machine Operator on the Employer's assembly line.
3. In 2008, the Employer had in place a Progressive Discipline Policy (the "Discipline Policy"). The progressive steps of the Discipline Policy included verbal warning, written warning, suspension and termination. In cases of serious misconduct and/or negligence, the Employer

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

could bypass the “steps” outlined in the Discipline Policy in order to apply the appropriate level of discipline warranted by the seriousness of the situation.

4. On April 24, 2008, the Employer issued the Petitioner her first written warning for unsatisfactory work performance, citing the Petitioner for having committed an error that resulted in 74,900 damaged pieces. The Employer also warned the Petitioner that if she made any further significant errors, she could be suspended or terminated.
5. In October 2008, the Petitioner reported to a manager that she had observed a male co-worker who held the position of Lead Operator sexually harassing female employees.
6. On November 25, 2008, the Employer issued the Petitioner her second written warning for negligence and unsatisfactory work performance because the Petitioner had incorrectly sorted 87,000 pieces. The Employer warned the Petitioner that any further incidents would lead to termination.
7. In November 2008, the Petitioner reported to the Employer’s Human Resources Manager that the same Lead Operator she had previously reported was still sexually harassing other female employees.
8. On December 16, 2008, after the Petitioner had incorrectly glued 40,000 pieces, the Employer discharged the Petitioner. The Employer’s articulated reason for discharging the Petitioner was her continued unsatisfactory work performance and negligence.
9. When the Petitioner filed her charge with the Respondent, the Respondent required the Petitioner to have a physician complete a Medical Questionnaire. Based on the answers provided on the Medical Questionnaire, the Respondent would determine whether or not the Petitioner was disabled within the meaning of the Act.
10. On the completed Medical Questionnaire Form submitted by the Petitioner’s physician, the physician indicated that the Petitioner’s alleged disability, hip joint disorder, was first diagnosed by him on October 6, 2009, which was approximately ten months after the Employer discharged her.
11. In her charge, the Petitioner alleged the Employer discharged her in retaliation for having opposed unlawful sexual harassment and because she is disabled. In her Request, the Petitioner reiterates that her discharge was in retaliation for having reported sexual harassment. The Petitioner further argues that the Employer found a reason to discharge her because she was injured on the job and as a result could not perform her job at “100%.”
12. In its Response, the Respondent asks the Commission to sustain its dismissal of the Petitioner’s charge for Lack of Substantial Evidence (Count A) and Lack of Jurisdiction (Count

B). The Employer articulated a non-discriminatory reason for discharging the Petitioner, which was her unsatisfactory work performance and negligence, and the Respondent argues that there is no substantial evidence that the Employer's articulated reason was pretext for unlawful discrimination or retaliation. The Respondent further argues that it lacks jurisdiction over Count B because the Petitioner failed to show that she was disabled within the meaning of the Act at the time the alleged adverse action occurred.

CONCLUSION

The Commission concludes that the Respondent properly dismissed Count A of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

As to Count A, the Commission finds no substantial evidence of retaliation. The Employer states it discharged the Petitioner in accordance with its Discipline Policy because of her continued unsatisfactory work performance and negligence. The Employer had disciplined other employees, who had not engaged in protected activity, in accordance with its Discipline Policy for unsatisfactory work performance and negligence. The Petitioner's errors were documented by the Employer, and there is no substantial evidence that the Employer's stated reason for discharging the Petitioner was pretext for retaliation.

In the absence of any evidence that the business consideration relied upon by the Employer was a pretext for unlawful discrimination, the Commission cannot substitute its judgment for the Employer's business judgment. See Berry and State of Illinois, Department of Mental Health and Developmental Disabilities, IHRC, ALS No. S-9146 (December 10, 1997).

As to Count B, the Commission concludes the Respondent properly dismissed Count B of the Petitioner's charge for Lack of Jurisdiction. The Petitioner failed to prove that she was disabled on or before the date of the alleged adverse action. The Medical Questionnaire Form submitted by the Petitioner's physician indicated that the Petitioner was first diagnosed with her back disorder on October 6, 2009, which was approximately ten months after the alleged harm had occurred. Clearly, the Employer could not have been motivated by an alleged disabling condition that had not been diagnosed until ten months after the Petitioner had been discharged.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show that the Respondent's dismissal of her charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

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In the Matter of the Request for Review by: Rufina Guerrero

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Mead Westvaco Consumer Packaging Group, LLC, as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 14th day of July 2010.

Commissioner David Chang

Commissioner Marylee V. Freeman

Commissioner Charles E. Box